87-1674

No.

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1988

ERNESTO J. BENEVENTO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ERNEST A. BENEVENTO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CARMINE LOIACONO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Exclusionary Rule applies to the fruits of a seizure made in violation of 31 U.S.C. Section 5317(b)?*

2. a. Whether the decision below was correct in its finding that there had been no violation of the rule of *Franks v. Delaware, supra?*

2. b. Whether it was error for the trial court to not grant an evidentiary hearing and to not allow the defense to call the issuing magistrate as a witness on the issue of whether there had been a violation of the rule in *Franks v. Delaware,* 434 U.S. 154 (1978)?

3. Whether acts of conspiracy can be predicate acts for a substantive RICO charge?

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*Questions 1 and 2 are raised by the Petitioners Ernesto J. and Ernest A. Benevento, to whom question 3 is inapplicable. Question 3 is raised by the Petitioner Loiacono who does not have standing to raise questions 1 and 2.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Opinion Below 2

Jurisdiction 2

Constitutional Provision and Statutes 2

Statement of the Case 7

The Record 7

The Facts 8

Reasons for Granting the Writ 12

Conclusion 24

Appendix A—Opinion of the District Court 1a

Appendix B—Opinion of the United States Court of Appeals for the Second Circuit 20a

Appendix C—Order Denying Rehearing 48a

TABLE OF AUTHORITIES

Cases *Pages*

Draper v. United States, 358 U.S. 307 (1959) 15

Franks v. Delaware, 438 U.S. 154 (1978) 14

Massachusetts v. Scheppard, 468 U.S. 981, 104 S.Ct. 3424 (1984) 14

Rea v. United States, 350 U.S. 215 (1956) 12

Sgro v. United States, 287 U.S. 206 (1932) 18

United States v. Bagaric, 706 F.2d 42 (2nd Cir. 1983) 24

United States v. Chemaly, 741 F.2d 1346 (11th Cir. 1984) 12

United States v. Cruz, 785 F.2d 399 (2d Cir. 1986) 17

United States v. Dennis, 624 F.2d 782 (8th Cir. 1980) 15

United States v. Domme, 753 F.2d 950 (11th Cir. 1985) 18

United States v. Fama, 758 F.2d 834 (2d Cir. 1985) 14,15,16,18

United States v. Ferguson, 758 F.2d 843 (2d Cir.) *cert. den.* 106 S.Ct. 124 (1985) 14

United States v. Gomez, 652 F.Supp. 461 (E.D.N.Y. 1987) 16

United States v. Grant, 759 F.2d 484 (5th Cir.) *reh den.* 765 F.2d 1120, *cert. den.* 106 S.Ct. 149 (1985) 17

United States v. Lefkowitz, 618 F.2d 1313 (9th Cir. 1980) *cert. den.* 101 S.Ct. 86 15

United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405 (1984) 14

United States v. Mankani, 738 F.2d 538 (2d Cir. 1984) 14

United States v. Marin-Buitrago, 734 F.2d 889 (2d Cir. 1984) 15

United States v. Martin, 615 F.2d 318 (5th Cir. 1989) 15

United States v. Melvin, 596 F.2d 492 (1st Cir. 1979) *cert. den.* 444 U.S. 937.....15

United States v. Ruggiero, 726 F.2d 913 (2d Cir. 1984) 22

United States v. Savoca, 761 F.2d 292 (6th Cir.) *cert. den.* 106 S.Ct. 153 (1985) 15

United States v. Stanert, 762 F.2d 775 (9th Cir. 1985) ...19

United States v. Valenzuela, 596 F.2d 824 (9th Cir.) *cert. den.* 441 U.S. 965 (1979) 15

United States v. Weisman, 624 F.2d 1118 (2d Cir.) *cert. den.* 449 U.S. 871 (1980) 22

United States v. Williams, 737 F.2d 594 (7th Cir. 1987) 15

United States v. Young, 745 F.2d 773 (2d Cir. 1984) *cert. den.* 470 U.S. 1084 (1985) 16

Constitutional Provisions

Amendment IV 12-21

Statutes

18 U.S.C. Section 1961 22,23

18 U.S.C. Section 1962 23

31 U.S.C. Section 5317(b) 12-13

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UNITED STATES OF AMERICA,

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PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Ernesto J. Benevento, Ernest A. Benevento and Carmine Loiacono, pray that a Writ of Certiorari issue to review the orders of the United States Court of Appeals for the Second Circuit, entered in this case on December 18, 1987.

OPINION BELOW

The opinion of the District Court (Weinfeld, J.) is annexed hereto as Exhibit "A." The opinion of the Court of Appeals for the Second Circuit affirming the order of the District Court is annexed hereto as Exhibit "B." The order of the Court of Appeals for the Second Circuit denying petitioners' application for rehearing is annexed hereto as Exhibit "C."

JURISDICTION

The order of the Court of Appeals was entered on December 18, 1987. The petitioners filed a timely petition for rehearing which was denied by the Court of Appeals on February 8, 1988. The jurisdiction of this Court is invoked under Title 28, United States Code Section 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Fourth Amendment to the United States Constitution:

> *Unreasonable searches and seizures.*
> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Title 31 U.S.C. Section 5317(b):

> *§5317. Search and forfeiture of monetary instruments*
> (b) A monetary instrument being transported may be seiz-

ed and forfeited to the United States Government when a report on the instrument under section 5316 of this title [31 USCS §5316] has not been filed or contains a material omission or misstatement. A monetary instrument transported by mail or a common carrier, messenger, or bailee is being transported under this subsection from the time the instrument is delivered to the United States Postal Service, common carrier, messenger, or bailee through the time it is delivered to the addressee, intended recipient, or agent of the addressee or intended recipient without being transported further in, or taken out of, the United States. (Sept. 13, 1982, P.L. 97-258, §1, 96 Stat. 998.) (Prior to amendment in October, 1986.

Title 18 U.S.C. Section 1961:

§1961. Definitions

As used in this chapter

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to the obstruction of State or local law enforcement), section 1951 (relating to racketeering), section 1953 (relating to interstate transportation of wager-

ing paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 [29 USCS §186] (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of

the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subidivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;
(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;
(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;
(9) "documentary material" includes any book, paper, document, record, recording, or other material; and
(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.
(Added Oct. 15, 1970, P.L. 91-452, Title IX, §901(a), 84 Stat. 941; Nov. 2, 1978, P.L. 95-575, §3(c), 92 Stat. 2465.)

Title 18 U.S.C. 1962:

§1962. Prohibited activities
(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern

of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code [18 USCS §2], to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Added Oct. 15, 1970, P.L. 91-452, Title IX, §901(a), 84 Stat. 941.)

STATEMENT OF THE CASE

The Record

The record on appeal consists of all filed documents as well as the minutes of all proceedings, of the trial and of the sentences.

Introduction

Petitioner Ernesto J. Benevento was convicted in the United States District Court for the Southern District of New York, after a trial by jury, of conspiracy to violate the narcotics laws (21 U.S.C. Sec. 846, Count I); violating the Travel Act (18 U.S.C. Sec. 1952 and 2, Counts II and III); Rico [18 U.S.C. Sec. 1962(c), Count IV); Rico conspiracy [18 U.S.C. 1962(d), Count V]; and a continuing Criminal Enterprise (21 U.S.C. Sec. 848, 18 U.S.C. Sec. 2, Count VI) and on March 27, 1987 was sentenced to 25 years imprisonment and a fine of $250,000 (Count I), five years imprisonment and a fine of $250,000 (Count II), five years imprisonment (Count III), 20 years imprisonment (Count IV), 20 years imprisonment (Count V), and 25 years imprisonment (Count VI). Counts II, III, IV, V, and VI to run concurrently with each other and with Count I. A total of 25 years imprisonment and a $500,000 fine (Weinfeld, J.).

Petitioner Ernest A. Benevento was convicted in the United States District Court for the Southern District of New York, after a jury trial, of conspiracy to violate the narcotics laws (21 U.S.C. Sec. 846, Count I); violating the Travel Act (18 U.S.C. Sec. 1952 and 2, Counts II), Rico [18 U.S.C. Sec. 1962(c), Count IV], Rico conspiracy [18 U.S.C. 1962(d), Count V], and a continuing Criminal Enterprise (21 U.S.C. Sec. 848, 18 U.S.C. Sec. 2, Count VI) and on March 27, 1987 was sentenced to 18 years im-

prisonment and a fine of $100,000 (Count I), five years imprisonment and a fine of $50,000 (Count II), 18 years imprisonment and a fine of $150,000 (Count IV) and 18 years imprisonment (Count VI). Counts II, IV, and VI to run concurrently with each other and Count I. A total of 18 years imprisonment and a total fine of $250,000 (Weinfeld, J.).

Petitioner Carmine Loiacano was convicted in the United States District Court for the Southern District of New York, convicting Carmine Loiacano, after a trial by jury, of conspiracy to violate the narcotics laws (21 U.S.C. Sec. 846, Count I), Rico [18 U.S.C. Sec. 1962(c), Count IV], and Rico Conspiracy [18 U.S.C. Sec. 1962(d), Count V] and on March 27, 1987 sentencing him to fifteen years imprisonment and a $100,000 fine (Count I), fifteen years imprisonment (Count IV), and fifteen years imprisonment (Count V). All the sentences to run concurrently with each other and with the sentence imposed on Count I (Weinfeld, J.).

All petitioners were also found to be subject to forfeiture of proceeds of the narcotics violations [21 U.S.C. Sec. 853(a)(1), Count VII].

The Facts

A. *The luggage search in violation of Title 31 U.S.C. Section 5317(b).*

The Beneventos appeal from the district court's order which denied their motions to suppress the currency found in their luggage at Kennedy International Airport. *See* 649 F. Supp. at 1381-82. The Beneventos contend, first, that the customs agent's search of their luggage violated their fourth amendment rights because the search occurred

without a warrant and without probable cause; and, second, that the search violated 31 U.S.C. §5317(b) because the customs agent did not have "reasonable cause to believe" they were carrying currency in their luggage at the time he conducted the search.

Although the district court did not conduct an evidentiary hearing, nor did it make factual findings, the customs agent's affidavit filed in the district court sets forth the factual context in which the luggage search occurred. On June 3, 1985, while Customs Special Agent Joseph Henderson was on duty at the International Arrivals Building at Kennedy Airport, he was contacted by the SwissAir station manager. The station manager informed Henderson that one of his employees had recognized a passenger who had checked in for a flight to Geneva, Switzerland. The SwissAir employee remembered the passenger, who was later identified as Ernesto J. Benefento, as having accompanied a female passenger on a previous SwissAir flight to Geneva one month earlier, and, on that occasion, the female passenger's luggage had been stopped and searched for currency violations. On the basis of this information, Henderson proceeded to the SwissAir baggage loading area and searched the Beneventos' luggage for possible currency violations. In the luggage, Henderson found approximately $952,000 in cash for which the Beneventos had not filed the required outgoing currency declarations. Subsequent to the search, Henderson learned the specifics of the prior search involving Nobre. Thus, he discovered that, on May 2, 1985, customs agents had opened the luggage of Ms. Nobre as she prepared to board a SwissAir flight to Geneva, Switzerland, and, in her luggage, agents observed currency in excess of $200,000. On that prior occasion, Ernesto J. Benevento accompanied Nobre to the airport and checked her in for the flight.

B. *The Search Warrants for the Benevento Homes.*

On June 4, 1986, three search warrants were signed by Magistrate Patricia Jean Kyle in Florida to permit a search of the home of Ernesto J. Benevento located at 14780 Draft Horse Lane, West Palm Beach, Florida, the home of Ernest A. Benevento, located at 14832 Draft Horse Lane, West Palm Beach, Florida, and the home of Michael Maneri.

At the time of the issuance of these warrants, there was no evidence or information in the government's possession that either Ernesto J. or Ernest A. Benevento, located at 14832 Draft Horse Lane, West Palm Beach, Florida, and the home of Michael Maneri.

At the time of the issuance of these warrants, there was no evidence or information in the government's possession that either Ernesto J. or Ernest A. Benevento had committed any violation of law since their arrest at Kennedy Airport in June of 1985.

Given this one year gap in the government's information, there was no connection between any prior criminal activity and the present home of Ernesto J. or Ernest A. Benevento. Indeed, the homes had been purchased after the June, 1985 arrest and the apparent cessation of illegal activities.

At the time that the warrants were presented to the Magistrate, additional handwritten insertions were made. Since no hearing was held on the motion to controvert these warrants, there is no testimony as to the circumstances surrounding the making of these handwritten insertions. However, during the proceedings and from cer-

tain affidavits,* it is apparent that the insertions were made shortly before the warrant was signed and were in response to some inquiry of the Magistrate.

A search of the two premises was conducted and incredibly damaging evidence seized. Among that evidence were computer software, floppy discs, which contained very detailed records of what the government asserted was a drug importation and distribution conspiracy. Numerous other documents and papers were also seized. Many of these other documents and papers were used at trial to prove the conspiracy, its purpose, its members, and its financial dealings. Suffice it to say, the evidence seized from the search of the Benevento homes was the heart of the government's case.

C. The RICO Charges Against Loiacono.

The indictment included a RICO count against all three Petitioners. However, as to Petitioner, Loiacono, only two predicate acts were alleged. The first predicate act was a conspiracy to manufacture, distribute and process with intent to distribute heroin. The second predicate act was a conspiracy to import morphine base. Thus, the only predicate acts alleged against Petitioner Loiacono on the substantive RICO count were two conspiracies.

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*The Beneventos did make an offer of proof on the circumstances behind the making of the insertions. The Beneventos wished to call the Magistrate as a witness and filed two affidavits of Mr. Entin, Ernest A. Benevento's attorney at that time, setting forth his conversations with Magistrate Kyle and her willingness to be a witness in the Southern District of New York.

REASONS FOR GRANTING THE WRITS

I.

The decision below is in conflict with the decision of another Circuit and negates the then intended effect of Title 31 U.S.C. Section 5317(b)

The opinion below correctly finds that Agent Henderson's currency search was not supported by reasonable suspicion and was therefore in violation of Title 31 U.S.C. Section 5317(b). Thus, the only issue is whether the Exclusionary Rule applies to violations of that statute as then in effect.

The issue of whether the exclusionary rule is the appropriate remedy of violations of 31 U.S.C. Sec. 5317(b) was specifically decided in *United States v. Chemaly,* 741 F.2d 1346, 1354 n.2 (11th Cir. 1984). [The Court, relied on *Rea v. United States,* 350 U.S. 215, 217-18, 76 S.Ct. 292, 294-95, 100 L.Ed. 233 (1956)]. Congress did not specifically refer to exclusion as a remedy, but the Court in *Chemaly* so found based upon its analysis of the legislative history of the statute and analogous Supreme Court cases.

The Court below rejected the holding of *Chemaly* because it found nothing in the legislative history of Sec. 5317(b) to suggest that Congress, "in enacting that provision in 1984" intended the exclusionary remedy to apply to violations of the statute. Also, that when Congress wished to have an exclusionary rule, it included it in the statute, for example electronic surveillance 18 U.S.C. Sec. 2518(10)(a).

The Second Circuit opinion views the intent of Congress solely in terms of what occurred in 1984. However,

the predecessor statutes, 31 U.S.C. Sec. 1105 and 31 U.S.C. Sec. 5317(a) were enacted more than fifteen years ago. Under the prior statutes a warrant was required. The prior warrant requirement is a clear indication that Congress, at that time, wished the exclusionary rule to apply. It is impossible to believe that Congress wished to require a warrant, but intended no remedy for violations. It is wrong to look at the 1984 enactment without reference to the earlier statutes and the intent underlying them.

In this context, the lowering of the search requirement to "reasonable cause" in 1984, takes on a different meaning. What is significant is not the lowering of the standard, but the maintenance of any requirement at all. Under current case law, a border search requires no basis at all. Thus, if Congress merely wanted to free the hands of law enforcement, they could easily have abandoned this statute, as they did in October, 1986. This course would have made a great deal of sense, if Congress did not intend some remedy for violations.

There was no reason to keep the "reasonable cause" standard if there was no remedy. It is obvious that Congress did wish to relax the requirements for making currency searches, but as to the requirement it maintained, it meant it to still have some teeth.

The appropriate remedy for violations of Sec. 5137(b) prior to its amendment in 1986, is suppression of the fruits of that violation. Given that here Sec. 5137(b) applies and there was no reasonable cause, the money seized at JFK should have been suppressed. Accordingly, the decision below affirming the denial of the motion to suppress should be reversed and the motion granted and petitioners should be granted a new trial on all charges.

II. A.

The Decision below is incorrect in its finding that there had been no violation of the rule of *Franks v. Delaware.*

Under *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed. 2d 677 (1984), *reh. den.*, 468 U.S. 1250, 105 S.Ct. 52, 82 L.Ed. 942 (1984), the Exclusionary Rule does not apply where officers act in reasonable reliance upon a facially sufficient warrant issued by a detached neutral magistrate even when it is later determined that the warrant was not supported by probable cause. In a companion case, *Massachusetts v. Sheppard*, 468 U.S. 981, 104 S.Ct. 3424, 82 L.Ed. 2d 737 (1984), this Court stated the *Leon* rule even more broadly and applied it to a situation where the warrant was defective in misstating the items subject to seizure, since the affidavit in support of the warrant had properly set forth those items. Also, *United States v. Fama*, 758 F.2d 834 (2d Cir. 1985).

However, the Court in *Leon* did not state that where a warrant is relied upon and its terms are followed exclusion is never appropriate. The Court limited the Leon "good faith rule" to circumstances where the officer has reasonable grounds to believe that the warrant was properly issued. Expressly untouched by *Leon* is the doctrine of *Franks v. Delaware, supra*, namely that a warrant is invalid if based upon falsehoods knowingly or recklessly made in the supporting affidavit.

While *Franks* dealt with false statements, it extends to material omissions. *United States v. Mankani*, 738 F.2d 538 (2d Cir. 1984); *United States v. Ferguson*, 758 F.2d

843 (2d Cir.) *cert. den.* 106 S.Ct. 124 (1985); *United States v. Williams,* 737 F.2d 594 (7th Cir. 1984) *cert. den.* 105 S.Ct. 1354, *United States v. Dennis,* 624 F.2d 782 (8th Cir. 1980), *United States v. Lefkowitz,* 618 F.2d 1313 (9th Cir. 1980) *cert. den.* 101 S.Ct. 86, *United States v. Martin,* 615 F.2d 318 (5th Cir. 1980), *United States v. Melvin,* 596 F.2d 492 (1st Cir. 1979) *cert. den.* 444 U.S. 937. Indeed, in *United States v. Marin-Buitrago,* 734 F.2d 889 (2d Cir. 1984) this doctrine of material omission has been extended to information not known at the time of the original application but which is discovered before execution.

Here, there was a serious omission in the representations made to the issuing court which patently affected the determination to issue the warrant. The omission consisted of the failure to advise the issuing magistrate of the lack of significance of certain, last minute, handwritten insertions to the application for the warrants.

It must be recalled that probable cause to issue a search warrant for particular premises requires probable cause to believe that evidence of criminality will be found in the place to be searched. *Draper v. United States,* 358 U.S. 307 (1959).

Thus, the distinction between probable cause to arrest and probable cause to search. This distinction was clearly set forth in *United States v. Fama, supra* at 838.

> . . . probable cause to arrest does not necessarily give rise to probable cause to search . . . *United States v. Savoca,* 761 F.2d 292, 297 (6th Cir.) *cert. den.* 106 S.Ct. 153; *United States v. Valenzuela,* 596 F.2d 824, 828 (9th Cir.) *cert den.* 441 U.S. 965 (1979).

The affidavits in support of the warrant application present a real question as to the sufficiency of the allega-

tions relating to the nexus of criminality to the homes of Ernesto J. and Ernest A. Benevento.

Aside from the handwritten additions to the supporting papers, the only link between criminal activity and the Benevento homes comes from the affidavit of Agent Pharao (Rider 3, paras. 18-20) in which he states that in his expertise and experience, narcotics traffickers keep money, narcotics, books and records, and other evidence of such trafficking in their homes.

In *Fama,* despite similar, general statements made by an Agent Garcia, the court acknowledged that there was a "creditable probable cause question" *Id.* at 835. Actually, the Court in *Fama* did not resolve the probable cause issue because of *Leon* and only relied upon the expertise as a factor in determining the objective good faith of the officer. In *United States v. Gomez,* 652 F.Supp. 461 (E.D.N.Y. 1987), the Court held that the generalized opinions referred to in *Fama* and *United States v. Young,* 745 F.2d 733, 758 (2d Cir. 1984) *cert. den.* 470 U.S. 1084 (1985) do not alone supply probable cause. As the Court stated:

> Indeed, where, as here, there is nothing to connect illegal activity with the arrested person's apartment, to issue a warrant based solely on the agent's expert opinion would be to license vitually automatic searches of residences of persons arrested for narcotics offenses. *Id* at 463.

Thus, the "other information" becomes critical. Aside from the *Fama* affidavit, this "other information"* turns out to be the fact that there were computer pulse lines brought into the homes. The District Court and the

*Which the Second Circuit says is set forth at 649 F.Supp. 1382-83.

Second Circuit found that these pulse lines linked the homes to criminal activity. The existence of the pulse lines then is central to any evaluation of probable cause.

If probable cause was not set forth in the supporting papers, there is an issue as to the burden of proof on the issue of "good faith."

There does not appear to be any case in this Court as to the impact of a lack of probable cause on the determination of whether the officers acted in good faith. In *United States v. Grant*, 759 F.2d 484 (5th Cir.) *reh. den.* 765 F.2d 1120, *cert. den.* 106 S.Ct. 149 (1985), the Fifth Circuit held that where probable cause is lacking, the burden of showing good faith is shifted to the government. There is no more important requirement for a warrant than probable cause. Probable cause is the heart and soul of the right to search and its absence is no small matter. It is only proper that where probable cause is absent, the government bear the burden of proving good faith on the part of the officers. Below, the Court did not address this issue of burden of proof because it erroneously found probable cause.

Even if *Grant* is not to be followed, the circumstances of the case indicate that the officers who sought these warrants did not act in good faith.

In *Fama*, the Court stated that the expert opinion of an agent is a factor to be considered by the judge on the good faith issue. In *Fama*, as here, the expert opinion was that incriminating evidence and contraband is kept at trafficker's homes. In *United States v. Cruz*, 785 F.2d 399, 405-6 (2d Cir. 1986) the expert opinion was that narcotics dealers "customarily" maintain apartments and other locations apart from their residences to store drugs, etc.

The facility with which agents in their expert opinion justify any scenario severely undercuts the confidence with which we can view such assertions.

Also, here the agents cited *United States v. Fama, supra,* in his affidavit. The citation of case law by an agent in support of such an application is not common. Such a procedure is itself a sign of the agent's awareness of the weakness of the nexus to the residence and, in turn, is a further indicia of a lack of good faith.

Thus, even before we look at the interlineations, we have an agent relying upon only his general knowledge, citing case law to justify reliance on this expertise, and that this expert opinion, at least on its face, conflicts with other DEA experts who believe it is the customary practice of drug dealers to rent locations apart from their homes. The statement of Pharoa's expert opinion is a very slender reed upon which to base a finding of good faith.

The opinion below just brushes aside the entire issue of the interlineations by stating that there was probable cause. This position is wrong. Here there is no probable cause to search set forth; it is only by reference to *Leon* that this search can even be argued to be sustained. The issue is good faith, not probable cause to search, which is totally absent. In this context, given the delineation between probable cause to arrest and probable cause to search a particular location, the mere showing of probable cause to arrest, which ended in June of 1985, over a year before the warrants were issued, raised very serious problems for the Magistrate of staleness* and lack of nexus to

Sgro v. United States, 287 U.S. 206, 211, 53 S.Ct. 138, 140 (1932); *United States v. Domme,* 753 F.2d 950 (11th Cir. 1985).

the homes. Thus, the Magistrate was presented with a warrant application devoid of probable cause to search. These warrants would not have issued unless the agents had attempted to satisfy the Magistrate's misgivings as to probable cause by supplying what are, at best, half-truths.

The inserted material is obviously directed at showing that the Beneventos' alleged criminal activity not only was continuing, but was tied to their homes. Hence, the insertion of the material relating to the telephones and computer pulse lines being tapped and that the Beneventos now had telephone lines set up to make computer transmissions.

In this context, it was a critical omission to neglect to advise the Court that the prior wiretaps at the Beneventos' residences led to no new evidence. To thrust these new assertions at the Magistrate, divorced from the evidence of their lack of significance, is exactly the type of "omission" which cannot be countenanced.

> *By reporting less than the total story,* an affiant can manipulate the inferences a Magistrate will draw. To allow a Magistrate to be misled in such a manner can denude the probable cause requirement of all real meaning. *United States v. Stanert,* 762 F.2d 775 (9th Cir. 1985) (emphasis supplied)

So too, it is also omitted from the search warrant application that the Beneventos were under surveillance through this period of time and that, again, nothing linking criminality to the Benevento residences was discovered.

Most significant is the testimony of Agent Pharoa at a June 3rd, 1986, pre-trial detention hearing held in the Southern District of Florida.

In that testimony Agent Pharoa states:

> Q. Do you have any evidence of illegal acts by E.J. Benevento after June 3rd of 1985?
>
> A. No, sir (*Id.* at 62).

Where as here, there is no probable cause to search, or even where probable cause is marginal, the failure to advise the issuing magistrate that neither wiretaps nor surveillance turned up any further grounds for probable cause to search was material, indeed, crucial. Certainly, the issuing magistrate was entitled to be advised of this information before issuance or even execution of the warrant. The failure to so advise the magistrate is a clear violation of *Franks* and requires suppression of the fruits of the searches conducted pursuant to those warrants.

II. B.

The trial court erred in not granting an evidentiary hearing and not allowing the defense to call the issuing magistrate as a witness on the issue of whether there had been a violation of the rule in *Franks v. Delaware*

Defense counsel made an offer of proof both on the record and by affidavit that the issuing Magistrate had raised a question of staleness as to the information relating to the homes and inquired of the presenting agents whether there was any more current information regarding the Beneventos ongoing criminal conduct. As a response to the Magistrate's inquiry, the agents advised her of the existence of a court ordered wiretap on the phones in both Benevento homes and certain computer pulse lines. The Magistrate then caused the handwritten interlineations to be made. Of course, the Magistrate was not advised that the matters set forth in those interlineations led to absolutely no other evidence of criminality by the Beneventos.

Under the facts of this case, the rejection of the Magistrate's testimony was error. On the issue of good faith, evidence of the circumstances under which the handwritten insertions were made (i.e. at whose request? to resolve what problem?) is entirely proper and admissible.

The ruling below that the testimony of Magistrate Kyle was not admissible is erroneous and the matter should be remanded for a hearing at which the Magistrate's testimony should be heard.

III.

Acts of conspiracy cannot be predicate acts for a substantive RICO charge.

Carmine Loiacono was convicted of Rico and Rico conspiracy charges. As to Loiacono, the predicate acts for the Rico and the Rico conspiracy were the same; namely, a conspiracy to manufacture, distribute, and possess with intent to distribute heroin (the same conspiracy as set out in Count 1 of the indictment) and a second act of a conspiracy to import morphine base. Thus, the only predicate acts for both the Rico and Rico conspiracy were two violations of the conspiracy laws.

At trial, defense counsel objected to the use of conspiracies as predicates for the Rico or Rico conspiracy charges. Counsel forthrightly stated that the current law in the Second Circuit was contrary to his position. Under *United States v. Weisman,* 624 F.2d 1118, 1123-24 (2d Cir.) *cert. den.* 449 U.S. 871 (1980) and *United States v. Ruggerio,* 726 F.2d 913, 918 (2d Cir. 1984), conspiracies which involve substantive offenses set forth in 18 U.S.C. Sec. 1961(1)(D) and (A) may be Rico predicates.

Petitioner urges this Court to consider the decision in *Weisman.* In *Weisman,* the Court, after stating that appellants' arguments had force, rejected the notion that conspiracies cannot be Rico predicates. In its analysis, the Court ruled heavily on the breadth of the statutory language; ". . . any offense involving . . . dealing in nar-

cotics or other dangerous drugs, punishable under any law of the United States." 18 U.S.C. Sec. 1961(1)(D). In so doing, the Court rejected the argument that this interpretation could lead to unintended results (i.e. that a substantive crime and a conspiracy to commit that crime could satisfy the predicate acts requirement), and that Congress had specifically removed the specific reference to conspiracy as a predicate act from the final version of the bill, which contained no reference to conspiracy as predicate acts.

However, neither *Weisman* nor *Ruggerio,* in interpreting Congress' intent, dealt with the fact that Congress did include a specific reference to conspiracy in the Rico conspiracy section 18 U.S.C. Sec. 1962(d).

Under *Ruggerio,* at 921, the Court rejected the government's argument that no predicate acts are required to convict of a Rico conspiracy because it is sufficient to prove that a defendant conspired with others to engage in a pattern of racketeering consisting of predicate acts committed by others. Instead, the Court held that the government must prove that the defendant himself agreed to commit the predicate crimes.

The Second Circuit's current interpretation of what is required to convict for a Rico conspiracy is indistinguishable from that required for a conviction for a substantive Rico based upon conspiracies as predicate acts.

Under the facts of this case, to prove the substantive Rico charge as regards Loiacono, the government had to prove that Loiacono agreed to possess with intent to distribute, and separately to import.

Under the Rico conspiracy charge, the government had to prove that "defendant himself agreed to commit two or more predicate acts." 726 F.2d at 921 (i.e. the government had to prove appellant agreed to possess, etc. and separately agreed to import). Also, *United States v. Bagaric,* 706 F.2d 42, 62 (2d Cir. 1983).

Under the Second Circuit's present interpretation, one can commit a substantive Rico without ever commiting a substantive crime.

Congress could not have intended such a result. The removal of any specific reference to conspiracies in the substantive Rico provisions, coupled with the specific Rico conspiracy statute, clearly indicates that Congress did not intend to have conspiracies be predicate acts for substantive Rico, but rather that agreements to violate the listed crimes would be covered by the Rico conspiracy provisions. Accordingly, this Court should resolve this issue in favor of petitioner.

CONCLUSION

FOR THE REASONS STATED ABOVE THE PETITIONS FOR WRITS OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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APPENDIX A
OPINION OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

ERNESTO J. BENEVENTO, ERNEST A. BENEVENTO, a/k/a "Anthony Nuccio," GUIDO RENDEL, a/k/a "Paul Hanson," EARL ADMIRAL KELLER, and CARMINE LOIACONO,

Defendants.

SSS 86 Cr. 485 (EW)
OPINION

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EDWARD WEINFELD, D.J.

Five defendants are named in an indictment charging conspiracy and substantive violations of the RICO statute, 18 U.S.C. §1962(a), centering primarily about the importation, manufacture, distribution, and possession with intent to distribute heroin in violation of the Drug Control Act, 21 U.S.C. §812, et. seq. Three codefendants join in motions pursuant to Fed. R. Crim 12(b) and 41 for an order to suppress all evidence obtained as a result of:

1. a warrantless search of the luggage and persons of defendants Ernesto J. Benevento and Ernest A. Benevento at Kennedy Airport, Long Island, New York;
2. warrant searches of the respective residences of Ernesto J. Benevento and Ernest A. Benevento, located in West Palm Beach, Florida;

3. a warrant search of a home owned by Ernest A. Benevento in Chandler, Arizona; and
4. a warrantless search of the person and automobile of defendant Earl Admiral Keller in the vicinity of Tucumcari, New Mexico.

We consider each motion separately.

The Search at Kennedy Airport

Ernesto J. Benevento and Ernest A. Benevento move to suppress the fruits of the warrantless search of their persons and luggage that took place on June 3, 1985 at John F. Kennedy Airport. The search resulted in discovery of $952,000 in undeclared cash which was being transported out of the country in apparent violation of federal currency laws. The Beneventos maintain that there was no probable cause or reasonable suspicion to justify the search.

They first argue that border searches of persons *leaving* the United States should be held invalid unless conducted in accordance with the probable cause requirement of the Fourth Amendment. This contention is in direct conflict with the clear weight of authority of our Court of Appeals, which has explicitly held that the "border search" exception to the Fourth Amendment, established by the Supreme Court in *United States v. Ramsey*,[1] applies to persons *leaving* the United States as well as persons *entering* it.[2] Defendants have presented no reason to disturb this settled precedent.

Defendants next argue that the search was aimed at discovering unreported currency and that under 31 U.S.C.

1. 431 U.S. 606, 616-19 (1977).

2. *United States v. Ajlouny*, 629 F.2d 830, 833-34 (2d Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981); *United States v. Swarovski*, 592 F.2d 131, 133 (2d Cir. 1979).

§5317(b), currency searches may be conducted only if there is "reasonable cause" to believe that evidence of a currency violation will be found. Claiming the government had no such reasonable cause, the Beneventos urge the exclusion of the fruits of the search to deter future violations of §5317(b). The government does not dispute that the search was a currency search, but maintains, first, that there was "reasonable cause" to conduct the search and second, that even if not and §5317(b) was violated, the evidence obtained as a result should not be excluded since no exclusionary remedy is provided for in the federal statute.

Defendants, in support of their motion, rely upon the majority opinion in *United States v. Chemaly,*[3] an Eleventh Circuit case in which a divided panel held exclusion appropriate for evidence seized in a border search that violated the precursor to §5317(b). The majority reasoned that when Congress enacted 31 U.S.C. §1105, requiring a search warrant for currency searches at the border,

> [T]he universal understanding of the remedy for an illegal search without a warrant was exclusion of the evidence. If Congress did not specify exclusion as the remedy in 1970 when the legislation was passed, it necessarily was because the remedy was obvious.

In support of this proposition, the majority noted that exclusion is the general rule when the Fourth Amendment is

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3. 741, F.2d 1346, 1358 (11th Cir. 1984), *reinstated,* 764 F.2d 747 (1985) (en banc); *United States v. Turner,* 639 F. Supp. 982, 992 (E.D.N.Y. 1986).

violated and that in *Rea v. United States*,[4] and other Supreme Court cases, an exclusionary remedy had been applied to federal rules and statutes that did not explicitly so provide.

This Court declines to follow *Chemaly*, because there is no evidence in either the language or the legislative history of §5317(b) to suggest that Congress, in enacting that provision in 1984, intended that an exclusionary remedy be applied to illegally seized evidence.[5] Defendant's argument can draw no support from the application of such a remedy in other situations. Because the Fourth Amendment does not apply to border searches, the fact that the exclusionary rule is the remedy for Fourth Amendment violations carries no force in this instance. Moreover, the cases applying an exclusionary remedy under other statutes and rules are distinguishable. In *Rea v. United States*, for example, the application of an exclusionary remedy for a violation of the Federal Rules of Criminal Procedure was based in part on the fact that those rules were originally prescribed by the Supreme Court, giving the Court special authority in their interpretation and enforcement. Finally, it is to be noted that Congress in its own enactments does not rely on silence to indicate an exclusionary rule is appropriate; in enacting the electronic surveillance statute, for example, Congress made specific provisions for the exclusion of illegally obtained evidence. Having exercised its power explicitly in previous instances, had Congress wanted to exercise its authority in this instance, it knew how and would have ex-

4. 350 U.S. 214, 217-18 (1956).

5. *See United States v. Chemaly*, 741 F.2d 1346, 1358 (11th Cir. 1984), *reinstated*, 764 F. 2d 747 (1985) (en banc); *United States v. Turner*, 639 F. Supp. 982, 992 (E.D.N.Y. 1986).

pressed that purpose.[6]

Moreover, it must be remembered that *Chemaly* concerns the precursor to §5317(b), a statute enacted in 1970 to require that border searches be conducted pursuant to warrants. *Chemaly's* conclusions as to Congressional intent in 1970 are of doubtful relevance to the question of Congress's intent when it enacted §5317(b) fourteen years later, particularly when the express purpose of the new statute was to reduce the barriers to conducting currency searches. As Judge Platt noted in *United States v. Turner*,[7] §5317(b) eliminated the warrant requirement to give federal agents a freer hand in halting the efforts of drug traffickers to smuggle their earnings out of the country. Given the absence of any indication that Congress intended an exclusionary remedy, and given that such a remedy would weaken the manifest purpose of the statute, the Courts should not amend the statute by applying an exclusionary rule. The fruits of the airport search are thus admissible, and the motion to suppress is denied.

The Searches of the Florida Residences

On May 28, 1986, a magistrate of the Southern District of Florida issued warrants authorizing the search of the residence of Ernesto J. Benevento at 14780 Draft Horse Lane, West Palm Beach, Florida, and the residence of Ernest A. Benevento at 14832 Draft Horse Lane, also in West Palm Beach. The list of items to be searched for included:

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6. *See* 18 U.S.C. §2518(10)(a). Congress was also explicit about exclusion in 50 U.S.C. §1806(e)-(g), concerning military wiretaps.

7. 639 F. Supp. 982, 992 (E.D.N.Y. 1986).

> Monies, books, records, financial records, computer hardware and software, papers, photographs, documents, personal address books, and other things which constitute evidence of the commission of are are [sic] designed or intended as a means of or are the contraband or the fruit of the violation of the federal narcotics laws, the federal currency laws, and the federal tax laws.

The affidavits submitted to the magistrate described in detail evidence to support the charge that the Beneventos were part of a vast and far-flung criminal enterprise which, prior to June 3, 1985, had imported into the United States heroin and heroin precursor products with a street value in excess of $225,000,000. Based on interviews with confidential informants, the affidavits described the importation of morphine base at West Palm Beach, and its transportation to Phoenix, Arizona, where it was converted into heroin and shipped to New York for distribution. The affidavits also described how, again prior to June 3, 1985, the Beneventos were involved in several attempts to smuggle hundreds of thousands of dollars out of the United States on international air flights. During the first half of 1985 alone, currency in excess of $1,500,000 was seized from the Beneventos and Fatima dos Santos Nobre, an alleged accomplice. A review of the Beneventos' tax returns and known real estate holdings was also submitted as evidence of their unexplained and unreported wealth.

The principal affiant as to these matters was Louis A. Pharao, a Drug Enforcement Agent with six years' experience in approximately 200 narcotics investigations, of which 150 involved the distribution of heroin. Agent Pharao stated that the Beneventos operated "at the highest levels of international narcotics trafficking" and that significant drug traffickers frequently maintain,

among other things, large amounts of currency, records relating to drug transactions, and lists of names and telephone numbers of persons involved in such transactions. Because drug traffickers need ready access to these items and personal financial records are customarily kept at home, and because the Beneventos' homes were equipped with computers and computer pulse telephone lines that might prove useful in managing data concerning criminal transactions, Agent Pharao stated his belief that the Beneventos' residences contained evidence that would be probative of violations of federal narcotics, currency and tax laws.

Under *United States v. Leon*,[8] even if probable cause for a search is in fact lacking, the exclusionary rule is not applied if officers act in reasonable reliance upon a facially sufficient warrant issued by a detached, neutral magistrate. Defendants, however, move to suppress under an exception to *Leon* established in *Frank v. Delaware*[9] and its progeny. Under *Franks*, if a magistrate issues a warrant on the basis of affidavits containing falsehoods knowingly or recklessly made, the warrant is invalid. Subsequent cases have extended *Franks* to include material ommissions.[10] Defendants thus argue that the warrants are invalid because of the government's failure to state in the affidavits that it had no evidence of criminal activity by the Beneventos after June 3, 1985. In particular, defendants note that although the government

8. 468 U.S. 897 (1984).
9. 438 U.S. 154 (1978).
10. *United States v. Marin-Buitrago*, 734 F.2d 889 (2d Cir. 1984); *United States v. Williams*, 737 F.2d 594 (7th Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985); *United States v. Dennis*, 625 F.2d 782 (8th Cir. 1980); *United States v. Lefkowitz*, 618 F.2d 1313 (9th Cir. 1980), *cert. denied*, 449 U.S. 824 (1980); *United States v. Martin*, 615 F.2d 318 (5th Cir. 1980); *United States v. Melvin*, 596 F.2d 492 (1st Cir.), *cert. denied*, 444 U.S. 937 (1979).

stated that wiretaps had been placed on the computer pulse lines, it omitted to state that the wiretaps had failed to pick up any evidence of criminal activity subsequent to June 3.

The government's affidavits, however, are not misleading. They clearly identified the dates of the Beneventos' suspected criminal activity as prior to June 3, 1985, and they made no claim that there was continuing criminal activity at the Beneventos' residences. The affidavits were devoted to demonstrating probable cause to believe that specified items related to past crimes were still at their homes. Given the weight due an agent's expert opinion concerning the likelihood evidence will be found,[11] Agent Pharao's belief that evidence of the Beneventos' personal wealth, records of illegal drug transactions, and evidence linking the Beneventos to their conspirators might still exist provided a reasonable basis for the magistrate to issue the warrant. The absence of a statement that there was no evidence of continuing criminal activity has no bearing on whether evidence of past crimes might still exist. Such information was not material and does not cast doubt on the existence of probable cause for the issuance of the warrants.[12]

In particular, the absence of any statement that wiretaps on the Benevento's computer pulse lines failed to pick up incriminating evidence after June 3, 1985 cannot be considered a material omission. While the omission of exculpatory evidence might well be material, an absence of incriminating evidence is not exculpatory -- especially con-

11. *United States v. Fama,* 758 F.2d 834, 838 (2d Cir. 1985).

12. *United States v. Marin-Buitrago,* 734 F.2d 889, 895 (2d Cir. 1984).

sidering that the wiretaps were installed after the time when the alleged crimes were thought to have been committed. The fact that the Beneventos had such computer pulse lines supported the government's position that the Beneventos were sophisticated computer users who possessed the requisite skills and equipment to use computers in managing a criminal enterprise. This inference, in turn, made it all the more likely that incriminating records might be found at their homes. The government's affidavits are neither misleading, nor inadequate to support searches of the Beneventos' homes. Defendants' motion to suppress is therefore denied.

The Search of the Chandler, Arizona Residence

On May 28, 1986, a magistrate of the District of Arizona issued a warrant authorizing the search of 20615 South 124th Place in Chandler, Arizona. Defendant Ernest A. Benevento, joined by two co-defendants, challenges the issuance of the Arizona warrant on grounds similar to the challenges to the Florida warrant. Specifically, Benevento alleges that the affidavits in support of the warrant were misleading because they failed to mention the absence of any evidence of criminal activity after June 3, 1985 and that the allegations of past crimes were stale, and could not support a finding of probable cause.

~~Benevento~~'s motion to suppress must in the first instance be dismissed on the ground that he lacks standing to challenge the search. Although he possessed record title to the property, the testimony of his two nephews before a grand jury indicates that he gave up permanent residence at that location no later than 1982 and gave up any possessory interest in the property when he last left it in the late fall of 1984. Six months subsequent to that time, his nephews moved in and assumed responsibility for pay-

ment of the mortgage as well as the cost of all utilities on the property. No evidence has been submitted to negate this testimony. Since mere ownership is insufficient to demonstrate standing to object to a search,[13] and since Benevento surrendered his interest in the property, it can readily be inferred that he relinquished any expectation of privacy with regard to the Chandler location.[14]

Moreover, even if Benevento had standing to challenge the search, his challenge would fail for two reasons. First, for the same reasons given in the discussion of the Florida warrants, the affidavits in support of the Arizona warrant are not misleading. They were based solely on evidence of past activity at the site -- here the operation of a heroin conversion laboratory -- and did not depend on evidence of continuing criminal activity. Second, the argument concerning staleness is effectively rebutted by the affidavits' statement that traces of heroin can be found up to three years after its manufacture at a particular site. The motion to suppress is thus denied.

The Search of Keller's Car

On June 5, 1984, defendant Earl Admiral Keller was stopped on Interstte 40 in New Mexico by a policeman who clocked him with radar traveling at 57 m.p.h. in a 55 m.p.h. zone. The officer, upon approaching Keller's car, smelled a "sweet" odor coming from the car which he was "sure" was cocaine. While the officer retained possession of Keller's driver's license and registration, he asked if he could look in the trunk of the car. Keller said "sure." The

13. *United States v. Salvucci,* 448 U.S. 83, 90-91 (1980).

14. *See United States v. Annese,* 631 F.2d 1041, 1043 (1st Cir. 1980); *United States v. Gilman,* 684 F.2d 616, 619 (9th Cir. 1982).

officer looked into the trunk, felt the rear portion of the trunk, and concluded that there was a secret compartment. He asked Keller to follow him to the police station in his own car, and Keller complied. At the station Keller signed a written form consenting to a further search of his car, and the search revealed 19 gallon-size containers of morphine base concealed in a secret compartment in Keller's trunk.

Keller now moves to suppress the fruits of this search. Based on testimony at a hearing held in New Mexico that was submitted on this motion and the exhibits and testimony at hearings before this Court, he argues that: (1) the initial traffic stop was a sham, conducted as a pretext for a drug search; (2) the roadside search of the car trunk was unlawful, in that Keller did not voluntarily consent to it and the officer lacked probable cause to conduct it; (3) taking Keller to the police station constituted an arrest, for which the officer still lacked probable cause; and (4) the search at the police station was not voluntarily consented to and again was conducted without probable cause.

Keller's assertion that the stop for speeding was a mere pretext for a drug search is unsupported by any substantial evidence. Officer Philip Snedecker, who made the stop, testified that he clocked Keller traveling at 57 miles per hour using a radar device that had not been shut off since it was calibrated earlier that day. Keller's reply that he set his cruise control at the speed limit and lowered his speed when his radar detection device indicated that his car was under observation is inadequate to rebut the officer's testimony. The fact that Keller was using a radar detection device and his admission that he was stopped for speeding the previous day in a different state bolster the conclusion that he was speeding. The suggestion that even

if Keller was speeding, he was only stopped because he fit a drug courier profile prepared for New Mexico police is unpersuasive,[15] because Snedecker testified that he did not use any such profile, that it was his practice to stop persons traveling two miles over the speed limit, and that he had previously ticketed a local courthouse employee for such a violation.

Defendant's next contention is that his consent to the roadside search of his car trunk was not given voluntarily, but was mere "submission to authority" in a situation where the officer held his driver's license and vehicle registration. Whether Keller's consent to search was "'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances."[16] The fact that the officer held Keller's license and registration does not in itself vitiate his consent, since consent to a search may be voluntary even if a person is in custody.[17] In this case there is simply nothing to suggest that Keller did not consent

15. The defendant offered for the Court's viewing a videotape of a television news segment on the use of traffic stops as an excuse for narcotics searches by New Mexico police. The Court did not view the segment and it finds the program to be inadmissible hearsay. Based on counsel's summary of the tape, however, the Court doubts such evidence would alter its conclusion, since there is no evidence that this particular stop was a pretext for the search that followed. The issue is therefore to be decided upon the relevant testimony and not on a television journalist's account of methods employed to apprehend narcotics traffickers.

16. *Shneckloth v. Bustamonte,* 412 U.S. 218, 227 (1973).

17. *United States v. Watson,* 423 U.S. 411, 424 (1976).

voluntarily. There is no suggestion that the officer used force or threatened to use force; the officer and Keller had a friendly conversation about chiropractors and playing squash. Based upon Keller's demeanor in Court, and the fact that he was 40 years of age and had completed two years of college at the time of the search, the Court has no reason to find he was a man easily cowed by authority.

Upon the conclusion of his roadside search of Keller's car trunk, Officer Snedecker asked Keller to accompany him to the police station, which was a half mile down the road. Keller asks the Court to find that this request turned his detention into an arrest, which would require a finding of probable cause. However, the fact that Snedecker asked Keller to drive to a nearby location where a more thorough search would be possible does not convert an investigative stop into an arrest. In light of how close the police station was, the situation presented is similar to cases in which persons detained, but not arrested, at airports have been asked to step into the offices of customs officers or drug enforcement agents for further questioning or searches.[18] Whether an individual's detention amounts to an arrest depends upon all the facts, including "the degree of intrusion, the amount of force used, and the extent to which the [individual's] freedom of movement was curtailed."[19] There is no dispute that Keller was asked, not ordered, to drive to the station, that he was permitted to drive in his own car, that he was never physically restrained or threatened with force, and that his detention, starting with the stop on the highway, lasted no more than half an hour. Upon these facts, the Court concludes that Keller was not

18. *See United States v. Mendenhall,* 446 U.S. 544, 557 (1980); *United States v. Oates,* 560 F.2d 45, 57 (2d Cir. 1977); *United States v. Salter,* 521 F.2d 1326, 1328 (2d Cir. 1975).

19. *United States v. Ceballos,* 654 F.2d 177, 182-83 (2d Cir. 1981).

arrested and that his detention was not equivalent to an arrest.

In order to justify his continued detention of Keller, Snedecker needed no more than a "reasonable suspicion" that further investigation would reveal evidence of a crime.[20] Yet Snedecker not only had reasonable suspicion, but he also had "probable cause" -- sufficient evidence to justify his belief that there was "a probability or a substantial chance" that the car contained contraband.[21] When Snedecker first approached the car, he detected an odor he was "sure" smelled like cocaine, based upon his participation in three previous cocaine seizures. Upon examining the trunk of the car, Snedecker concluded that there was a secret compartment between the rear seats and the trunk, based upon his observation of a partition in the trunk where he expected to see the rear of the seats; the hardness of the partition; and the distance between the seats and the partition. Based upon the smell and the secret compartment, Snedecker had probable cause to further detain Keller, and if he chose, to arrest him and search the car without a warrant.

At a hearing before this Court, defendant produced expert witnesses who testified that cocaine does not smell sweet, but rather has a weak smell like photo developer; and that in most American cars one would not expect to see the back seats by looking through the trunk. In light of the difficulty lay persons have in describing chemical odors, this Court is satisified that Snedecker did detect a smell, which, based upon his previous experience in co-

20. *Terry v. Ohio,* 392 U.S. 1 (1968).

21. *Illinois v. Gates,* 462 U.S. 213, 244 n. 13 (1983).

caine seizures, he reasonably believed might be cocaine.[22] The Court also accepts that Snedecker, based upon his previous experience with cars, could detect that there was a secret compartment in Keller's trunk. In fact, it was upon his initial inspection that the the usual structure of the trunk area attracted his attention. Even if one assumes that defendant's expert was correct that one cannot see the rear seats of most American cars through their trunks --and there was no testimony concerning the precise make and year of car in question -- the expert's testimony that 19 one-gallon jugs would fill a third of the space in the trunk corroborates Snedecker's observation that there was an unusual amount of space behind the partition. This in itself would be sufficient to support Snedecker's belief that a secret compartment existed.

Once back at the station, although Snedecker could have searched the car based ujpon probable cause, he told Keller that he suspected his car contained drugs and asked him to sign a form authorizing a thorough search. Snedecker not only gave Keller the form to read, but he also read it to him. The form, only three sentences long, stated that Keller had "been informed of [his] constitutional right not to have a search made of the premises. . . .without a search warrant and of [his] right to refuse to consent to such a search." Using his alias "Chris E. Ciro," Keller signed directly below the sentence, "This written permission is being given by me to the above-named persons voluntarily and without threats or promises of any kind." Although Keller asserts that the officers told him that if he did not sign the consent form they would obtain a search warrant and perform the

22. The defendant's argument that one could smell nothing through the jars of morphine is irrelevant. There is no contention that the morphine produced the smell that Snedecker detected.

search in a manner that would damage the car, and that he could not leave until a search was conducted, these claims are not credible when viewed in light of the form Keller signed, Snedecker's testimony that Keller's consent was voluntary, and Keller's demeanor in Court, which showed him to be knowledgeable, articulate, and clearly aware of his rights. All evidence obtained from the search is thus admissible.

Motion For A Separate Trial

Defendant Carmine Loiacono moves pursuant to Fed. R. Crim. P. 14 for an order granting him a severance and a separate trial from his codefendants. A defendant seeking such relief bears the heavy burden of "demonstrating facts showing that he will be so severely prejudiced by a joint trial that it would in effect deny him a fair trial."[23] The basis of the application is that the charges against Loiacono's codefendants are far more numerous and serious than those against himself and that in the course of a trial lasting three or more weeks, evidence admitted only against the Beneventos might spill over to the prejudice of Loiacono. The law is clear, however, that "simply because the evidence against codefendants is stronger or that one defendant's role in the crime is lesser than that of others is not sufficient

23. *United States v. DiPaolo,* Nos. 1268, 1269, 1261, slip op. at 3848 (2d Cir. Oct. 30, 1986) (quoting *United States v. Rucker,* 586 F.2d 899, 902 (2d Cir. 1978)); *United States v. Wilkinson,* 754 F.2d 1427, 1433 (2d Cir.), *cert. denied,* 105 S.Ct. 3482 (1985); *United States v. Potamitis,* 564 F.Supp. 1484 (S.D.N.Y. 1983), *aff'd,* 739 F.2d 784, 789-91 (2d Cir.), *cert. denied,* 469 U.S. 918 (1984); *United States v. Wilson,* 565 F. Supp. 1416, 1435 (S.D.N.Y. 1983); *United States v. Kahaner,* 203 F. Supp. 78 (S.D.N.Y. 1962).

reason to grant a severance."[24] Defendant's burden is not met "either by counsel's speculation as to how joinder will impact upon the jury or that the defendant may have a better chance of acquittal at separate trials."[25] The motion for a separate trial is therefore denied, with leave to renew upon the trial.

Motion for a Bill of Particulars

Ernesto J. Benevento moves pursuant to Fed. R. Civ. P. 7(f) for a bill of particulars elaborating upon the allegation of a continuing criminal enterprise contained in Court Six of the indictment. The count alleges that certain violations of the law were committed "in concert with at least five other persons with respect to whom Ernesto J. Benevento and Ernest A. Benevento. . . .each occupied a position of organizer, supervisor and manager." Defendant thus requests a bill specifying: (1) the names and addresses of each person so supervised or managed; (2) whether the Beneventos exercised said supervision or management separately, jointly, or in concert: and (3) the acts of Ernesto J. Benevento upon which the government relies to establish said supervisory or managerial role.

None of these requests need be answered by the government, as the indictment already satisfies the demands of *Wong Tai v. United States*.[26] The indictment already names six co-conspirators who the government contends were organized, supervised, or managed by the

24. *United States v. Potamitis*, 564 F. Supp. 1484 (S.D.N.Y. 1983), *aff'd*, 739 F.2d 784, 789-91 (2d Cir.), *cert. denied*, 53 U.S.L.W. 3289 (1984).

25. *United States v. Wilson*, 565 F. Supp. 1416, 1435 (S.D.N.Y. 1983).

26. 273 U.S. 77, 80-81 (1927).

Beneventos. An exhaustive list is not needed.[27] Similarly, there is no requirement that the government list all overt acts allegedly committed by defendant in furtherance of the conspiracy.[28] Finally, details as to the degree of cooperation alleged between the Beneventos is not needed for the defendants to "properly. . . .prepare for trial. . . .meet the government's case and. . . .avoid surprise upon the trial.[29] The motion for a bill of particulars is thus denied.

So ordered.

Date: December 17, 1986
New York, New York

Edward Weinfeld
United States District Judge

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27. *United States v. Burt*, 765 F.2d 1364, 1367 (9th Cir. 1985).

28. *United States v. Carroll*, 510 F.2d 507, 509 (2d Cir. 1975), *cert denied*, 426 U.S. 923 (1976); *United States v. Iannelli*, 53 F.R.D. 482 (S.D.N.Y. 1971).

29. *United States v. Ianniello*, 621 F. Supp. 1455, 1478 (S.D.N.Y. 1985) (quoting *United States v. Wilson*, 556 F. Supp. 1416, 1439 (S.D.N.Y. 1983)), *aff'd*, slip op. 86-1088 (2d Cir. Dec. 4, 1986).

APPENDIX B
OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 52, 53, 54, 55—August Term, 1987

(Argued: September 1, 1987

Decided: December 18, 1987)

Docket Nos. 87-1173, -1174, -1175, -1176

UNITED STATES OF AMERICA,

Appellee,

—v.—

ERNESTO J. BENEVENTO, ERNEST A. BENEVENTO, EARL A. KELLER, and CARMINE LOIACONO,

Defendants-Appellants.

Before:

FEINBERG, *Chief Judge*,
PIERCE and ALTIMARI, *Circuit Judges*.

Appeal from judgments of convictions and sentencing orders entered after a jury trial in the United States

District Court for the Southern District of New York (Edward Weinfeld, *Judge*).

Affirmed in part, reversed in part and vacated in part.

J. JEFFREY WEISENFELD, New York, N.Y. (Goldberger & Dubin, P.C., New York, N.Y., of Counsel), *for Defendants-Appellants.*

JOHN K. CARROLL, Assistant United States Attorney (Rudolph W. Giuliani, United States Attorney, Southern District of New York, Kerri L. Martin, Assistant United States Attorney, of Counsel), *for Appellee.*

ALTIMARI, *Circuit Judge*:

Defendants-appellants Ernesto J. and Ernest A. Benevento, Earl A. Keller, and Carmine Loiacono appeal from judgments of conviction entered in the United States District Court for the Southern District of New York after a four-week jury trial before Judge Edward Weinfeld. After the district court denied their motions to suppress evidence, *see* 649 F. Supp. 1379 (S.D.N.Y. 1986), defendants were tried on a seven-count indictment. The indictment charged Ernesto J. and Ernest A. Benevento, inter alia, in count one with conspiracy to manufacture and distribute heroin in violation of 21 U.S.C. § 846, in

counts four and five with participating in a racketeering enterprise, the "J.E.M. Corporation," through a pattern of racketeering activity and with conspiring to violate the racketeering laws in violation of 18 U.S.C. §§ 1962(c) and 1962(d), and in count six with conducting a continuing criminal enterprise in violation of 21 U.S.C. § 848. Loiacono was charged with participating in the narcotics conspiracy and with the substantive RICO and RICO conspiracy violations. Keller was indicted only for participating in the narcotics conspiracy. After the jury convicted defendants of all crimes charged in the indictment, Judge Weinfeld sentenced them. In particular, he sentenced Ernesto J. and Ernest A. Benevento to serve, inter alia, concurrent terms of imprisonment on both the narcotics conspiracy and the continuing criminal enterprise counts.

On appeal, Ernesto J. and Ernest A. Benevento and Keller contend that the district court erred in denying their suppression motions. In addition, the Beneventos claim that the district court erred when it sentenced them on both the narcotics conspiracy and the continuing criminal enterprise counts. Ernest A. Benevento appeals separately, arguing that the district court erred when it instructed the jury that it could find him guilty on the continuing criminal enterprise count if the jury found that he aided and abetted Ernesto J. Benevento in conducting a continuing criminal enterprise. Loiacono contends, inter alia, that the government's evidence at trial was insufficient to establish that he violated the racketeering laws and that his convictions on both the substantive RICO and RICO conspiracy counts violated the double jeopardy clause of the fifth amendment.

For the reasons stated below, we affirm the judgments of conviction for the defendants on all counts, except we reverse Ernest A. Benevento's conviction on the continuing criminal enterprise charge in count six, and we vacate Ernesto J. Benevento's sentence on the narcotics conspiracy charge in count one.

Facts and Background

The government's evidence at trial established that, in early 1982, the Beneventos, Loiacono, and Keller, along with their criminal associates in the United States, Mexico, and Europe, joined together to form a criminal enterprise known as the "J.E.M. Corporation" ("J.E.M."). J.E.M. was organized for the purpose of facilitating a large-scale, international heroin manufacturing and distribution conspiracy. As part of this conspiracy, J.E.M. planned to 1) import into the United States various raw materials necessary for the manufacture of heroin, 2) convert those raw materials into a highly pure form of heroin, and 3) distribute the manufactured heroin through a network of distributors in the metropolitan New York area. By the time of J.E.M.'s discovery by government agents, it had completed its first manufacturing and distribution venture and planned additional ventures of similar magnitude.

During the first phase of J.E.M.'s operations, Ernesto J. Benevento, Loiacono, and others associated with J.E.M. purchased overseas large quantities of morphine base and surreptitiously imported it into the United States aboard a ship in South Florida, near West Palm Beach. Once the morphine base was successfully shipped into the United States, J.E.M. arranged to transport it to a house

in Chandler, Arizona, owned by Ernesto J. Benevento's uncle, Ernest A. Benevento, where a laboratory had been set up to facilitate the heroin manufacturing and conversion process.

Keller served as J.E.M.'s principal courier for shipping the morphine base from Florida to Arizona. In April 1984, Keller began shuttling back and forth in an automobile between West Palm Beach, Florida, and Chandler, Arizona, with plastic jugs containing morphine base hidden in the trunk of the car. In June 1984, when Keller was on the last courier run to Arizona, he was stopped for speeding by New Mexico State Police Patrolman Phillip Snedeker. After Snedeker stopped Keller and approached his automobile, he detected an odd odor, which he believed was associated with cocaine, emanating from the car. His suspicions aroused, Snedeker asked Keller if he could inspect the trunk of the car, and Keller agreed. Snedeker observed that the trunk had been altered to include a partition which created a hidden compartment between the back of the trunk and the passenger compartment. Snedeker then requested that Keller accompany him a short distance to the local state police office for a more thorough search. Keller complied and followed Snedeker to the police station in his automobile.

Upon arriving at the police station, Snedeker asked Keller whether the police could conduct a search of the automobile. Keller agreed and executed a consent form which authorized the search. The ensuing search uncovered nineteen plastic jugs containing morphine base. The jugs were hidden in the trunk of the automobile behind the partition that Snedeker had observed. The New Mexico police then arrested Keller.

Through Keller's efforts, approximately 300 kilograms of morphine base were transported to the Arizona laboratory. While morphine base was being transported to Arizona, Ernesto J. Benevento, Loiacono, and their associates proceeded to hire two drug chemists, Francois Scapula and Charles Altieri, to conduct the heroin manufacturing and conversion process. Thereafter, J.E.M. arranged to smuggle Scapula and Altieri into the United States aboard Ernesto J. Benevento's yacht. Once inside the United States, Scapula and Altieri flew to Arizona and began the manufacturing process under the supervision of Ernesto J. Benevento and Loiacono. When the manufacturing process was complete, J.E.M. began distributing the heroin. Employing six distribution groups located in metropolitan New York, J.E.M. sold approximately 146 kilograms of heroin from July 1984 to March 1985 for a gross profit of approximately $23 million.

Due to the success of the first venture, J.E.M. began planning a second venture, "project 2," which was to be of similar organization and magnitude as the first. To fund the second venture, the Beneventos, Loiacono and their associates each contributed $200,000. Since much of the initial activity for the second venture was to take place outside the United States, J.E.M. had to smuggle the investment capital out of the country. For this purpose, J.E.M. conscripted Fatima dos Santos Nobre, Scapula's girlfriend, to serve as a currency courier. By this time, however, J.E.M.'s operations had fallen under the scrutiny of the Drug Enforcement Agency ("DEA"), and DEA agents maintained surveillance over Nobre during her trips out of the country while smuggling currency. Thus, in March 1985, during Nobre's first currency smuggling trip, and after she had checked in for her flight

from Miami to Geneva, Switzerland, DEA agents seized her luggage and searched it. In her luggage, agents found currency in excess of $400,000 for which Nobre had not filed a currency declaration. The agents then seized the currency and marked her bags in such a manner to suggest that an airline employee, or some other person, had tampered with them to avoid Nobre's suspicion of the DEA agents' actions.

In May 1985, when Nobre prepared for a second currency smuggling trip, she met Ernesto J. Benevento at a hotel in New York City, where she was given several hundred thousand dollars in currency earmarked for the second drug venture. Benevento then drove Nobre to Kennedy International Airport and accompanied her as she checked-in for a SwissAir flight to Geneva. Once Nobre had checked her luggage with SwissAir government agents seized the luggage and searched it. As a result of this search, the agents discovered the currency given her by Benevento. To avoid suspicion, however, they did not seize the currency, but photographed it before replacing it in Nobre's luggage.

The following month, Ernesto J. and Ernest A. Benevento attempted to make another currency smuggling run for J.E.M. The Beneventos arrived at Kennedy International Airport and checked their luggage with SwissAir prior to the departure of a flight to Geneva. When they checked in for the flight, however, a SwissAir employee recognized Ernesto J. Benevento as the man who had accompanied Nobre one month earlier when government agents searched her luggage for currency. SwissAir officials then alerted Customs Special Agent Joseph Henderson as to Benevento's presence on the flight. Henderson proceeded to seize the luggage

Benevento had checked for the flight and searched it. In the luggage, Henderson discovered $956,000 in currency for which the Beneventos had not filed outgoing currency declarations. Customs agents then arrested the Beneventos for currency violations as the were boarding their flight to Geneva.

From the time of their arrest on the currency charges in June 1985, until they were arrested on the narcotics conspiracy charges in May 1986, the Beneventos remained free on bail. During this time, the government's investigation into the narcotics conspiracy was continuing and culminated in the search of the Beneventos' Florida homes, as well as searches of other locations suspected of containing evidence of J.E.M.'s operations, including the Arizona laboratory. The search of the Beneventos' homes yielded computer records maintained by Ernest A. Benevento which included detailed financial accounting information regarding J.E.M.'s drug operations.

In December 1986, the grand jury indicted the defendants and charged all of them in count one with participating in a narcotics manufacturing and distribution conspiracy in violation of 21 U.S.C. § 846 (the "narcotics conspiracy" count). The Beneventos were charged in count two with interstate travel in aid of racketeering violation of 18 U.S.C. § 1952 and Ernesto J. Benevento was charged in count three with a separate violation of section 1952. The Beneventos and Loiacono were charged in count four with participating in a racketeering enterprise from January 1982 through May 1986 in violation of 18 U.S.C. § 1962(c) ("substantive RICO" count), and the indictment set forth as predicate acts the narcotics conspiracy, a conspiracy to import morphine base into the United States, failure to file outbound currency declara-

tions and interstate travel in aid of racketeering. The Beneventos and Loiacono were charged in count five with conspiracy to participate and conduct the affairs of a RICO enterprise, the J.E.M. Corporation, in violation of 18 U.S.C. § 1962(d) ("RICO conspiracy" count) and this count alleged the same predicate acts that were set forth in count four. In count six, the Beneventos were charged with conducting a continuing criminal enterprise in violation of 21 U.S.C. § 848 (the "CCE" count).

Prior to trial, the Beneventos and Keller filed motions to suppress evidence. Keller moved to suppress evidence that resulted from the search of his automobile, and the Beneventos moved to suppress, inter alia, evidence obtained from the search of their luggage at Kennedy International Airport and the searches of their Florida homes. The district court denied Keller's and the Beneventos' suppression motions. *See* 649 F. Supp. 1379 (S.D.N.Y. 1986).

At trial, the government overwhelmingly established the defendants' guilt of the crimes charged in the indictment. The computer records obtained from Ernest A. Benevento's home substantially corroborated the government's witnesses' testimony and set out in detail the intricacies of J.E.M's international drug operations. On March 27, 1987, after the jury returned a guilty verdict against all defendants on each count in the indictment, Judge Weinfeld sentenced the defendants as follows: Ernesto J. Benevento was sentenced to two concurrent twenty-five-year terms of imprisonment on counts one and six, twenty-year terms on counts four and five, five-year terms on counts two and three and was ordered to pay a $500,000 fine on counts one and two. Ernest A. Benevento was sentenced to four concurrent eighteen-year

terms of imprisonment on counts one, four, five and six, a five-year term on count two and was ordered to pay a $250,000 fine on counts one and four. Judge Weinfeld sentenced Loiacono to three concurrent fifteen-year terms of imprisonment on counts one, four and five and ordered him to pay a $100,000 fine on count one. Keller was sentenced to a ten-year term of imprisonment on count one.

DISCUSSION

A. *Denial of motion to suppress the morphine-base evidence.*

Keller presents several arguments in support of the conclusion that the district court erred in denying his motion to suppress the morphine base evidence. Keller's main contention is that the district court erred when it found that his detention, starting with the roadside stop and continuing through to his detention at the police station, constituted a permissible investigative detention pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968). *See* 649 F. Supp. at 1385-87. Keller argues that, once he accompanied Snedeker to the police station while Snedeker retained his license and vehicle registration, the initial roadside traffic stop was transformed into an arrest and that, because this constructive arrest allegedly was not supported by probable cause, it was illegal. Keller argues, accordingly, that the morphine base evidence constituted fruits of an illegal arrest and thus should have been suppressed.

We see some merit in Keller's contention that the scope of a permissible "*Terry* stop" may not extend as far as the district court's view would permit. Indeed, in a factually

similar context, a divided panel of the Tenth Circuit held that, when an officer retains an individual's driver's license and vehicle registration and requests that the individual return with the officer to the police station, that individual has been seized within the meaning of the fourth amendment, and the seizure must therefore be supported by probable cause. *See United States v. Gonzales*, 763 F.2d 1127, 1130-33 (10th Cir. 1985).

Nevertheless, we need not reach this question because we agree with the district court's alternate holding that Snedeker had probable cause to search the automobile and arrest Keller at the roadside. *See* 649 F. Supp. at 1386. In support of its finding of probable cause, the district court found that, after stopping Keller's automobile, Snedeker detected an odor, which he believed smelled like cocaine, emanating from the car. Then, after conducting a consensual inspection of Keller's trunk, Snedeker noticed the presence of a partition, which structually altered the trunk and created a hidden compartment between the rear of the trunk and the back of the passenger compartment. On the basis of these factual findings, the district court concluded that Snedeker had a reasonable belief that Keller was carrying contraband in the automobile and thus had probable cause to search the vehicle and arrest Keller. *Id.*

Probable cause "requires only a probability or substantial chance of criminal activity, [and] not an actual showing of such activity." *Illinois v. Gates*, 462 U.S. 213, 243-44 n.13 (1983). Determination of whether probable cause is present must be drawn from an evaluation of "the totality of the circumstances," *id.* at 241, and the appropriate standard must be applied in a "flexible, common-sense" manner. *Texas v. Brown*, 460 U.S. 730,

742 (1983). Moreover, a district court's determination of probable cause is given "great deference" on appeal. *See United States v. Vasquez*, 634 F.2d 41, 45 (2d Cir. 1980).

The district court's factual findings clearly indicate that there was a substantial likelihood that Keller's car contained contraband. Thus, from the totality of these circumstances, probable cause existed to search the automobile and arrest Keller at the roadside. Even though Snedeker did not formally arrest Keller at the roadside, he legally could have. Moreover, Snedeker did not lose the right to search the vehicle and arrest Keller by delaying the search until he arrived at the station house. *See United States v. Johns*, 469 U.S. 478, 485-88 (1985). We therefore conclude that the district court did not err in denying Keller's suppression motion because, even if we were to find that his detention was transformed into a constructive arrest, that arrest was lawful since it was supported by probable cause.

Keller's remaining contentions—that the district court erred when it found 1) Snedeker stopped Keller's automobile for a traffic violation, rather than because Keller fit some so-called drug courier profile, 2) Keller *voluntarily* allowed Snedeker to examine the trunk of his automobile, and 3) Keller *voluntarily* executed the consent form, which authorized the automobile search at the police station—represent challenges to the district court's resolution of essentially factual questions, which it made after conducting an evidentiary hearing. Without restating the facts as found by the district court, we are satisfied that its conclusions were fully supported by evidence in the record, and thus are not clearly erroneous. *See United States v. Mast*, 735 F.2d 745, 749 (2d Cir. 1984); *United States v. Lace*, 669 F.2d 46, 52 (2d Cir.), *cert. denied*, 459

U.S. 854 (1982); *United States v. Price*, 599 F.2d 494, 503-04 (2d Cir. 1979).

B. *Denial of motions to suppress the currency found in the Beneventos' luggage.*

The Beneventos appeal from the district court's order which denied their motions to suppress the currency found in their luggage at Kennedy International Airport. *See* 649 F. Supp. at 1381-82. The Beneventos contend, first, that the customs agent's search of their luggage violated their fourth amendment rights because the search occurred without a warrant and without probable cause; and, second, that the search violated 31 U.S.C. § 5317(b) because the customs agent did not have "reasonable cause to believe" they were carrying currency in their luggage at the time he conducted the search.

In its decision denying the suppression motions, the district court rejected both of the Beneventos' contentions. The district court concluded that the search did not violate the Beneventos' constitutional rights because it found that the search fell within the so-called "border search" exception to the fourth amendment. *See* 649 F.Supp. at 1382. Turning to defendants' section 5317 argument, the district court held that, even if the customs agent's search violated that section, the evidence seized would nevertheless be admissible because no exclusionary remedy is provided for in the statute. *Id.* at 1381-82. We agree with both of the district court's legal conclusions.

Although the district court did not conduct an evidentiary hearing, nor did it make factual findings, we have the benefit of the customs agent's affidavit filed in the district court, which sets forth the factual context in which the luggage search occurred. On June 3, 1985,

while Customs Special Agent Joseph Henderson was on duty at the International Arrivals Building at Kennedy Airport, he was contacted by the SwissAir station manager. The station manager informed Henderson that one of his employees had recognized a passenger who had checked in for a flight to Geneva, Switzerland. The SwissAir employee remembered the passenger, who was later identified as Ernesto J. Benevento, as having accompanied a female passenger on a previous SwissAir flight to Geneva one month earlier, and, on that occasion, the female passenger's luggage had been stopped and searched for currency violations. On the basis of this information, Henderson proceeded to the SwissAir baggage loading area and searched the Beneventos' luggage for possible currency violations. In the luggage, Henderson found approximately $952,000 in cash for which the Beneventos had not filed the required outgoing currency declarations. Subsequent to the search, Henderson learned the specifics of the prior search involving Nobre. Thus, he discovered that, on May 2, 1985, customs agents had opened the luggage of Ms. Nobre as she prepared to board a SwissAir flight to Geneva, Switzerland, and, in her luggage, agents observed currency in excess of $200,000. On that prior occasion, Ernesto J. Benevento accompanied Nobre to the airport and checked her in for the flight.

At the outset, it is clear that Henderson's search of the luggage did not violate the Beneventos' constitutional rights. The facts set forth above establish that the search fell within the so-called "border search exception" to the fourth amendment, which allows government agents to conduct inspections at the border without a warrant and without probable cause. *See United States v. Ramsey*, 431

U.S. 606, 616-19 (1977). Here, Henderson searched the Beneventos' luggage at the airport as it was being prepared for loading onto the SwissAir flight to Geneva. Thus, although the search occurred as the Beneventos were departing the country, it nevertheless constituted a permissible border search and thus was not violative of the defendants' fourth amendment rights. *See United States v. Ajlouny*, 629 F.2d 830, 834-35 (2d Cir. 1980) (border search exception applies to searches of persons departing country as well as to searches of persons entering the country), *cert. denied*, 449 U.S. 1111 (1981); *United States v. Swarovski*, 592 F.2d 131, 133 (2d Cir. 1979) (same).

Despite the absence of any constitutional provision prohibiting customs agents from conducting routine currency searches at the border, Congress has on three occasions enacted legislation that limited the scope of such searches. In 1970, Congress enacted Pub. L. No. 91-508, 84 Stat. 1114, which, *inter alia*, granted authority to the Secretary of the Treasury to apply to any court of competent jurisdiction for a warrant, based on probable cause, to search any person reasonably believed to be in the process of illegally transporting monetary instruments. Pub. L. No. 91-508, § 235(a), 84 Stat. 1114, 1123-24 (1970). When Congress recodified Title 31 of the United States Code in 1982, it retained the probable cause and warrant requirement. *See* 31 U.S.C. § 5317(a) (1982) (current version at 31 U.S.C.A. § 5317(b) (West Supp. 1987)). In 1984, however, Congress amended this statute to permit customs officers to stop and search, without a warrant, "any person entering or departing from the United States with respect to whom the officer has *reasonable cause* to believe there is a monetary instrument

being [illegally] transported." 31 U.S.C. § 5317(b) (Supp. II 1985) (current version at 31 U.S.C.A. § 5317(b) (West Supp. 1987)) ("section 5317(b)"). Because the Beneventos' luggage was searched at a time when this last-mentioned statute was in effect, the search was lawful only if it was supported by "reasonable cause."[1]

The "reasonable cause" standard of section 5317(b) has been equated with "reasonable suspicion." *See, e.g., United States v. Hernandez-Salazar*, 813 F.2d 1126, 1138 (11th Cir. 1987); *United States v. Turner*, 639 F. Supp. 982, 985 n.1 (E.D.N.Y. 1986). "Reasonable suspicion" in turn, is a lesser standard than probable cause, but requires more than just an "inchoate and unparticularized suspicion or 'hunch.' " *New Jersey v. T.L.O.*, 469 U.S. 325, 346 (1985).

Given the circumstances surrounding this case, it appears that Henderson's decision to search the Beneventos' luggage for currency was based on no more than an "unparticularized suspicion or 'hunch.' " In his affidavit in opposition to the Beneventos' suppression motion, Henderson stated:

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1 Section 5317 was again amended in October 1986 to provide that

> For purposes of ensuring compliance with the requirements of section 5316, a customs officer may stop and search, at the border and without a search warrant, any vehicle, vessel, aircraft, or other conveyance, any envelope or other container, and any person entering or departing from the United States.

See Pub. L. 99-570, Title I, § 1355, 100 Stat. 3207-22 (October 27, 1986). As amended, section 5317 no longer requires that customs agents have "reasonable cause to believe" that currency violations are present before conducting a search, and thus appears to authorize currency searches to the extent allowed by the Constitution.

> On June 3, 1985, . . . I was on duty at . . . John F. Kennedy Airport, New York, New York. At that time, I was contacted at my station by the Swissair station manager. In substance and among other things, that manager advised me that a Swissair employee had advised him that a passenger who had checked in to board Swissair flight 111 was familiar to that employee. Particularly, I was informed that the employee recognized Ernesto J. Benevento as an individual who, with another female individual, had checked baggage with Swissair on a recent occasion. On that prior occasion, the baggage had been the subject of an outbound currency search.
>
> *Subsequent* to [the currency search], I learned that on or about May 2, 1985, Customs Service officers opened the luggage of Fatima dos Santos Nobre as she prepared to board Swissair flight 111 to Geneva, Switzerland. In that luggage they observed at least $200,000 in United States currency. I *subsequently* also learned that Ernesto J. Benevento had checked Nobre in at the Swissair desk on that date.

Joint Appendix at 184-85 (emphasis added). On the basis of the foregoing affidavit, it does not appear that the currency search was conducted in accordance with the customs agent's reasonable suspicion. The evidence suggests that Henderson relied solely on the hearsay statement of the Swissair manager that, on some prior occasion, Ernesto J.Benevento had checked some luggage that had been subjected to a currency search; significantly, there is *no* evidence that Henderson was aware of the *result* of the previous search of Nobre's luggage. To conclude that Henderson had reasonable suspicion in this context would suggest that the mere fact that a person (or

his companion) has been subjected to a prior search is sufficient to cast a shadow of suspicion over that person for some indeterminate period of time—regardless of the fact that the previous search may have turned up no evidence of criminal activity. In the absence of any evidence that Henderson was aware of the result of the previous search, we conclude that the currency search was not supported by reasonable suspicion.

We nevertheless conclude that the district court properly denied the Beneventos' suppression motions. As the district court reasoned, there is nothing in the legislative history of section 5317(b) indicating that Congress intended an exclusionary remedy for violations of the statute. Instead, "the fact that the exclusionary rule is the remedy for Fourth Amendment violations carries no force in this instance," because the amendment does not apply *at all* to routine border searches. *See* 649 F. Supp. at 1382. Moreover, Congress has *expressly* provided for the exclusion of evidence obtained in violation of *other* federal statutes. *See, e.g.*, 18 U.S.C. § 2518(10)(a) (providing an exclusionary remedy for evidence obtained in violation of the federal wiretapping statute); 50 U.S.C. § 1806(e)-(g) (providing an exclusionary remedy for illegal military wiretaps). In addition, as the district court noted, in passing section 5317(b) Congress intended to bestow greater powers on federal agents to prevent drug traffickers from engaging in currency smuggling. Consequently, in the absence of any evidence of an intent to the contrary, the courts "should not weaken the manifest purpose of the statute." 649 F. Supp. at 1382. Finally, we note that suppression may not be the only means of deterring unlawful currency searches; conceivably, the victims of the unlawful search may have an implied cause

of action against the violating officer. *United States v. Chemaly*, 741 F.2d 1346, 1358-59 (11th Cir. 1984) (Tjoflat, J., dissenting), *reinstated*, 764 F.2d 747 (1985) (en banc). Accordingly, we conclude that the district court properly denied the Beneventos' motions to suppress the currency evidence.

C. *Denial of motions to suppress evidence recovered after search of Florida homes.*

The Beneventos next contend that the district court erred in denying their motions to suppress the evidence obtained from the search of their Florida homes. The Beneventos argue that the government's affidavits—upon which the search warrant applications and the magistrate's probable cause determination were made—contained "serious omission[s]" which "patently affected" the magistrate's probable cause determination. They argue, pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), that the omissions were deliberate and materially misled the magistrate who issued the search warrants. They conclude that the search warrants were therefore illegal and that the evidence seized pursuant to the warrants should have been suppressed. The district court rejected these arguments after it found that the government's affidavits did not contain material omissions. The district court also concluded that the magistrate's finding of probable cause to search was supported by the evidence in the government's affidavits. *See* 649 F. Supp. at 1383-84. We agree.

The Beneventos point out that the search warrants were issued by the magistrate on June 4, 1986 and, at that time, no evidence was presented to the magistrate which demonstrated that the Beneventos had committed a crime since their arrest at Kennedy International Airport in

June 1985. The Beneventos claim that the government failed to bring to the magistrate's attention the "one year gap in the government's information" as to the Beneventos' criminal activity, i.e., from June 1985 to June 1986. The Beneventos contend that this represented a material omission because, had it been brought to the magistrate's attention, it would have shown that there was no connection between the Beneventos' prior criminal activity and their current Florida homes.

We agree with the district court's conclusion that this claimed "omission" was in fact not an omission at all. As the district court stated,

> [t]he government's affidavits . . . are not misleading. They clearly identified the dates of the Beneventos' suspected criminal activity as prior to June 3, 1985, and they made no claim that there was continuing criminal activity at the Beneventos' residences.

See 649 F. Supp. at 1383-84. Accordingly, we find that the district court properly rejected the Beneventos' claim that the search warrant applications contained material omissions.

We also agree with the finding of the district court that probable cause to search the homes was present. The affidavits filed by the government in support of its search warrant applications contained extensive testimony regarding the Beneventos' involvement in an international narcotics conspiracy and contained specific statements from the government's confidential informants that provided key details of various aspects of the narcotics conspiracy. Included in the applications was the testimony of DEA Agent Pharao, who stated that, based upon his extensive experience in drug enforcement investigations, it

was his opinion that drug traffickers, as the Beneventos were alleged to be, were likely to keep various items of evidence of drug-related activity including transactions records, large sums of currency, etc., in their personal homes. In addition, the warrant applications included other information that suggested a link between the Beneventos' Florida homes and their prior criminal activity. *See* 649 F. Supp. at 1382-83.

Several courts have held that a government agent's expert opinion, such as that provided by Agent Pharao here, "is an important factor to be considered by the judge" when making a probable cause determination. *See United States v. Fama*, 758 F.2d 834, 838 (2d Cir. 1985) (and cases cited therein). Although Pharao's testimony, standing alone, might not be sufficient to establish a link between the Beneventos' current homes and their prior criminal activity, *see United States v. Gomez*, 652 F. Supp. 461, 463 (E.D.N.Y. 1987), when viewed together with the other evidence in the government's affidavits, we are satisfied that probable cause to believe that evidence of prior criminal activity was located in their homes was amply demonstrated. Accordingly, we affirm district court's order which denied the Beneventos' motions to suppress the evidence obtained from their Florida homes.

D. *Aiding and abetting liability under 21 U.S.C. § 848.*

Ernest A. Benevento appeals his conviction on the continuing criminal enterprise charge in count six of the indictment. Benevento contends that the district court erred in instructing the jury that it could find him guilty of violating section 848 if it found that he aided and abetted Ernesto J. Benevento in the operation of a continuing criminal enterprise. Benevento acknowledges that

the indictment charged him as a principal, as well as an accomplice, and he does not deny that the jury's instructions on direct liability under that section were correct. He argues, however, under *Sandstrom v. Montana*, 442 U.S. 510 (1979), that where two instructions are given to the jury and one version is correct and the other erroneous and where it cannot be deduced which instruction the jury followed, the conviction must be reversed. *See* 442 U.S. at 526.

The government did not respond to Benevento's *Sandstrom* argument, and it appears from the government's brief that it all but concedes that Benevento could not have been found guilty directly under section 848—presumably because trial evidence did not sufficiently establish that he coordinated or managed five or more individuals in the conduct of the enterprise. *See* 21 U.S.C. §848(d). Nevertheless, the government argues that, under limited circumstances, aiding and abetting liability is appropriate in section 848 cases. The government acknowledges that mere employees of an enterprise may not be convicted under that section, but contends that an individual who provides substantial assistance to the criminal enterprise's principal and who acts in a managerial capacity while furthering the enterprise's activities, should be held liable as an aider and abettor, even if he could not be held liable as a principal. The government suggests that the evidence at trial demonstrated that Benevento engaged in managerial functions throughout J.E.M.'s drug operations and provided substantial assistance to Ernesto J. Benevento. The government points out that Benevento provided J.E.M. with the use of his Arizona home for the drug manufacturing laboratory, maintained detailed financial records for the enterprise on

his computer at home, contributed substantial amounts of capital to fund the second drug venture and attempted to smuggle currency out of the United States for J.E.M. The government concludes that, in Benevento's case, aiding and abetting liability would be appropriate.

Recently, in a decision issued after oral argument in the instant appeal, this court determined that aiding and abetting liability, pursuant to 18 U.S.C. § 2, is not available in prosecutions under section 848. *See United States v. Amen*, 831 F.2d 373, 381-82 (2d Cir. 1987). In light of our decision in *Amen*, we conclude that the district court erred when it instructed the jury that it could convict Benevento under section 848 if it found that he aided and abetted Ernesto J. Benevento in operating a continuing criminal enterprise. Furthermore, because it appears that the evidence at trial was insufficient to convict Benevento as a principal under that section, we reverse his conviction on the continuing criminal enterprise charge in count six. *See Amen*, 831 F.2d at 382.

E. *Substantive RICO and RICO conspiracy counts.*

Loiacono appeals his convictions on counts four and five of the indictment, which charged him with substantive and conspiracy violations of the Racketeer Influenced and Corrupt Organizations Act. 18 U.S.C. §§ 1962(c) and (d). Loiacono contends, first, that, because the two conspiracies alleged in the indictment as predicate acts arose from a single "overall" conspiracy, the government has failed to satisfy RICO's pattern requirement, 18 U.S.C. § 1961(5); and, second, that his conviction on *both* the substantive RICO and the RICO conspiracy counts violates the double jeopardy clause of the fifth amendment. We disagree.

1. The pattern requirement.

To satisfy the pattern requirement in a RICO prosecution, the government must prove that the defendant committed at least two of the predicate acts listed in section 1961(1) within ten years of each other. *See* 18 U.S.C. § 1961(5); *United States v. Ianniello*, 808 F.2d 184, 189-93 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 3229 (1987). The indictment charged as predicate acts that Loiacono participated in a conspiracy to import morphine base into the United States in violation of 21 U.S.C. § 963 and participated in a conspiracy to manufacture and distribute heroin in violation of 21 U.S.C. § 846. Conspiracies to violate the narcotics laws, if proven, are properly chargeable as predicate acts. *See United States v. Ruggiero*, 726 F.2d 913, 918 (2d Cir.), *cert. denied*, 469 U.S. 831 (1984); *United States v. Weisman*, 624 F.2d 1118, 1123-24 (2d Cir.), *cert denied*, 449 U.S. 871 (1980); 18 U.S.C. § 1961(1)(D).

At issue, then, is whether the conspiracies are separate crimes or a single crime. Since a defendant can conspire only to import drugs or only to distribute them, we think that each conspiracy can exist independently, and a defendant could be convicted of one or of both without violating the double jeopardy clause. The fact that Loiacono committed both crimes as part of a single plan does not invalidate the RICO conviction, since this circuit has rejected the view that a pattern of racketeering activity or a racketeering enterprise must consist of multiple ventures or plans. So long as the defendants commit at least two predicate acts, they have met the pattern requirement and, so long as the enterprise is long and elaborate enough to be considered continuing, the enterprise requirement is satisfied. *See Beck v. Manufacturers*

Hanover Trust Co., 820 F.2d 46, 51 (2d Cir.), *petition for cert. filed*, 56 U.S.L.W. 3322 (U.S. Oct. 13, 1987) (No. 87-616); *Ianniello*, 808 F.2d at 190-92.

If anything, the relatedness of the two conspiracies makes the case against Loiacono more compelling because this relationship highlights the continuity in the enterprise. The conspiracy to import morphine base was part of a larger plan that included the narcotics manufacturing and distribution conspiracy. In addition, trial evidence established that defendants planned additional narcotics ventures, and even had taken steps towards a second venture. Accordingly, we find that the predicate acts of racketeering charged in the indictment and proven at trial satisfy the requirements of the RICO statute precisely because they were two important aspects of a large-scale, continuous drug enterprise.

2. Double jeopardy.

Loiacono contends that, where the underlying predicate acts alleged in a RICO prosecution are conspiracies, a conviction under both the substantive RICO and RICO conspiracy sections, 18 U.S.C. §§ 1962(c) and (d), violates the double jeopardy clause of the fifth amendment. We disagree.

"A single transaction may give rise to liability for distinct offenses under separate statutes without violating the Double Jeopardy Clause." *United States v. Biasucci*, 786 F.2d 504, 515 (2d Cir.), *cert. denied*, 107 S.Ct. 104 (1986) (quoting *United States v. Barton*, 647 F.2d 224, 235 (2d Cir.), *cert. denied*, 454 U.S. 857 (1981)). The applicable test for determining whether two offenses are sufficiently distinct to allow prosecutions under each

statute is that set forth in *Blockberger v. United States*, 284 U.S. 299 (1932):

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. . .

See Albernaz v. United States, 450 U.S. 333, 337-38 (1981); *Biasucci*, 786 F.2d at 515-16.

Loiacono's convictions under the statutory provisions at issue here, 18 U.S.C. §§ 1962(c) and 1962(d), satisfy the *Blockberger* test. To establish the existence of a RICO conspiracy, the government was required to prove only the existence of an agreement to violate RICO's substantive provisions. Thus, the government necessarily had to establish that Loiacono agreed with his criminal associates to form the RICO enterprise, the J.E.M. Corporation, agreed to associate himself with that enterprise and agreed to commit two predicate acts in furtherance of a pattern of racketeering activity in connection with the enterprise. In contrast, Loiacono's conviction on the substantive RICO count required proof, not of an agreement to violate the substantive RICO sections, but actual proof that Loiacono associated himself with the enterprise and committed at least two predicate acts in connection with the conduct of the enterprise.

The significant distinctions between the proof required to establish the RICO conspiracy and the underlying substantive RICO offense belie Loiacono's claim that convictions under both the substantive and conspiracy counts violate the double jeopardy clause. *See Pinkerton*

v. United States, 328 U.S. 640, 643-44 (1946) (convictions under both a conspiracy statute and underlying offense do not violate double jeopardy clause). Although the predicate acts charged under the two offenses were the same, proof of the acts was only one element necessary to establish Loiacono's guilt of those offenses. Accordingly, because the *Blockberger* test was satisfied here, we find no double jeopardy violation.

F. *Merger of lesser included offense into continuing criminal enterprise conviction.*

Ernesto J. Benevento contends, and the government agrees, that the district court erred in sentencing him to concurrent terms of imprisonment on *both* count one, the narcotics conspiracy count, and count six, the continuing criminal enterprise count. The parties agree that the narcotics conspiracy charge is a lesser included offense of a continuing criminal enterprise violation, and it is clear that "a conviction on a lesser included offense may not stand as a separate conviction." *United States v. Osorio Estrada*, 751 F.2d 128, 134 (2d Cir. 1984), *modified on reh'g on other grounds*, 757 F.2d 27, *cert. denied*, 474 U.S. 830 (1985).

When an individual is sentenced on both a lesser and greater offense, the conviction on the lesser charge is "combined" with the conviction on the greater offense, although it is not "merged out of existence." *Id.* at 135. Nevertheless, the conviction on the lesser offense may not have any collateral effect, unless the conviction on the greater charge is subsequently overturned. *See United States v. Aiello*, 771 F.2d 621, 634-35 (2d Cir. 1985). We therefore vacate Ernesto J. Benevento's sentence on count one, and we remand for the purpose of combining

the conviction on the lesser offense with that on the greater offense and for resentencing.

CONCLUSION

We have considered the defendants' remaining arguments and find that each of them is without merit. In view of the foregoing, the judgments of conviction are affirmed, except Ernest A. Benevento's conviction on the continuing criminal enterprise charge in count six is reversed, and Ernesto J. Benevento's sentence on the narcotics conspiracy charge in count one is vacated and the matter is remanded.

APPENDIX C
ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Eighteen day of December one thousand nine hundred and eighty-seven.

Present: HON. WILFERD FEINBERG, CHIEF JUDGE,
HON. LAWRENCE W. PIERCE,
HON. FRANK X. ALTIMARI,
Circuit Judges,

UNITED STATES OF AMERICA,
Appellee,

v.

ERNESTO J. BENEVENTO, ERNEST A. BENEVENTO, EARL A. KELLER, and CARMINE LOIACONO,
Defendants-Appellants.

Docket No. 87-1173, - 1174, - 1175 - 1176

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the Judgments of said District Court be and it hereby is affirmed in part, reversed in part and vacated in part and the action be and it hereby is remanded to the said district court for further proceedings in accordance with the opinion of this court.

ELAINE B. GOLDSMITH,
Clerk
s/ Edward J. Guardaro
By: Edward J. Guardaro,
Deputy Clerk

ISSUED AS MANDATE:
Feb. 17, 1988
ELAINE B. GOLDSMITH
s/ Elaine B. Goldsmith
Clerk